

Message Text

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ORIGIN ERDA-07

INFO OCT-01 NEA-10 ISO-00 COME-00 FEA-01 ACDA-10
CIAE-00 INR-07 IO-14 L-03 NSAE-00 NSC-05 EB-08
NRC-07 OES-07 DODE-00 SS-15 SP-02 /097 R

DRAFTED BY U.S.ERDA/GC: J GLASGOW

APPROVED BY OES/NET/IM: D HOYLE

U.S.ERDA/IRDP: H CURTIS

U.S.ERDA/PROC: W NEUSTADT

OES/NET: D COOPER

U.S.ERDA/IRDP: H JAFFE

NEA/IN: P LANDE

L/OES: R BETTAUER

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FM SECSTATE WASHDC

TO AMCONSUL BOMBAY PRIORITY

INFO AMEMBASSY NEW DELHI PRIORITY

UNCLAS STATE 195445

E.O. 11652: N/A

TAGS: IN, TECH

SUBJECT: PROPOSED AGREEMENT ON TARAPUR FEASIBILITY STUDY

REFERENCES: A) BOMBAY 1791; B) BOMBAY 1200; C) STATE 168761;
D) STATE 081468

1. BEGIN SUMMARY: RESPONSE IS PROVIDED HEREIN TO GOI
COMMENTS (REFTEL A) ON TEXT OF AGREEMENT TRANSMITTED REFTEL
C. PLEASE TRANSMIT FOLLOWING COMMENTS TO SHAH AND ADVISE
US OF HIS RESPONSE. END SUMMARY.

2. U.S. REGRETS MISUNDERSTANDINGS WHICH HAVE ARISEN
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CONCERNING THE SCOPE OF WORK FOR THE STUDY. ORIGINAL SCOPE
OF WORK (AS TRANSMITTED REFTEL D ON APRIL 12, 1977) WAS
INTENDED AS BRIEF DESCRIPTION OF THE GENERAL NATURE OF THE
STUDY RATHER THAN A DEFINITIVE SUMMARY. USG AGREED TO
FULLER STATEMENT AS TRANSMITTED CLAUSE 1, REFTEL B. BUT,
USG DID NOT CONTEMPLATE THAT STATEMENT OF WORK TRANSMITTED
MIGHT BE DEEMED TO INCLUDE PROVISION OF DETAILED DESIGN OR
CONSTRUCTION INFORMATION. REFERENCE BY GOI TO "METHOD FOR
INCREASING SPENT FUEL STORAGE CAPACITY" AND "DETERMINATION
OF TECHNIQUES, SPECIAL EXPERTISE AND/OR SPECIAL EQUIPMENT"

(REFTEL B CLAUSE 1) AS WELL AS DESIGN BASIS AND DRAWINGS
(PARA 4A REF B) WERE NOT SEEN BY USG AS AN UNDERTAKING TO

SUPPLY DEFINITIVE DESIGN OR CONSTRUCTION DATA BUT TO PROVIDE DETAILED INFORMATION ON WHICH GOI COULD CHOOSE A SOLUTION. INDEED, ERDA LACKS PRESENT BUDGETARY AUTHORITY TO PROVIDE DETAILED DESIGN OR CONSTRUCTION INFORMATION. USG APPRECIATES GOI'S STATEMENT THAT GOI DOES NOT INTERPRET SCOPE OF WORK AS GOING BEYOND SUBJECTS WHICH ERDA CAN STUDY UNDER EXISTING AUTHORITY. FOR CLARITY, USG RESTATES ITS POSITION CONCERNING SCOPE OF WORK. ERDA IS PREPARED TO PROVIDE GOI WITH A FEASIBILITY STUDY, AS DESCRIBED IN CLAUSE 1 OF REFTEL C WHICH WILL CONTAIN PRELIMINARY DESIGN DATA NECESSARY TO ALLOW THE GOI TO PROCEED DIRECTLY TO DETAILED DESIGN AND POSSIBLE POOL MODIFICATION. IF, HOWEVER, GOI WISHES TO HAVE A MORE GENERAL SCOPE OF WORK IN THE ERDA/GOI AGREEMENT, WE ARE PREPARED TO DELETE CLAUSE 1 OF REFTEL C AND SUBSTITUTE THE FOLLOWING: "CLAUSE 1: ERDA, IF NECESSARY THROUGH OR WITH THE ASSISTANCE OF ITS CONTRACTORS OR SUBCONTRACTORS, WILL CONDUCT A STUDY CONCERNING THE FEASIBILITY FOR INCREASING THE SPENT FUEL STORAGE CAPACITY OF THE EXISTING STORAGE POOL AT THE TARAPUR ATOMIC POWER STATION. THE RESULTS OF THIS FEASIBILITY STUDY WILL PROVIDE PRELIMINARY DESIGN DATA TO THE GOI WHICH WILL ALLOW THE GOI TO SELECT AN APPROPRIATE OPTION AND PROCEED THEREFROM TO DETAILED DESIGN. THE SCOPE OF THE STUDY SHALL BE AS FOLLOWS: 1. A DETERMINATION OF STRUCTURAL ADEQUACY AND NUCLEAR SAFETY ASPECTS. 2. THE ADEQUACY OF COOLING FOR ADDITIONAL HEAT LOAD AND RECOMMENDATIONS OF POSSIBLE ALTERNATIVE PRELIMINARY DESIGNS. 3. FEASIBILITY AND POSSIBLE PROCEDURES OF INSTALLATION OF NEW HIGHER DENSITY RACKS UNDER PRESENT CONDITIONS INCLUDING ALTERNATIVE SUGGESTIONS FOR HANDLING FUEL ALREADY IN STORAGE AND DISPOSAL OF THE EXISTING RACKS. 4. RECOMMENDATION OF TECHNIQUES, SPECIAL EXPERTISE AND/OR SPECIAL EQUIPMENT AND MATERIALS INVOLVED. 5. ESTIMATES OF INSTALLATION TIME, COST, AND STORAGE GAIN FOR SUCH NEW RACKS FOR EACH ALTERNATIVE RECOMMENDED. 6. ANY OTHER ASPECT THAT MAY ARISE FROM A CONSIDERATION OF THE ABOVE TASKS AND MAY NEED TO BE PURSUED TO ACHIEVE THE STUDY'S OBJECTIVES."

3. SECOND MAJOR ISSUE REMAINING CONCERNS G.E. DESIRE FOR ADDITION OF A NEW SENTENCE TO CLAUSE 9 OF THE AGREEMENT. IN RESPONSE TO GOI CONCERNS ABOUT SENTENCE, USG ASKED G.E. TO RECONSIDER ITS POSITION AND PROVIDE A FULL EXPLANATION OF ITS NEED FOR THE SENTENCE. AS REVISED BY G.E. TO EXPRESS ITS POINT MORE NARROWLY AND CONCISELY, THE SENTENCE IS AS FOLLOWS: "THIS INDEMNITY SHALL APPLY TO ALL CLAIMS,

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ABILITY STUDY WILL PROVIDE PRELIMINARY DESIGN DATA TO THE GOI WHICH WILL ALLOW THE GOI TO SELECT AN APPROPRIATE OPTION AND PROCEED THEREFROM TO DETAILED DESIGN. THE SCOPE OF THE STUDY SHALL BE AS FOLLOWS: 1. A DETERMINATION OF STRUCTURAL ADEQUACY AND NUCLEAR SAFETY ASPECTS. 2. THE ADEQUACY OF COOLING FOR ADDITIONAL HEAT LOAD AND RECOMMENDATIONS OF POSSIBLE ALTERNATIVE PRELIMINARY DESIGNS. 3. FEASIBILITY AND POSSIBLE PROCEDURES OF INSTALLATION OF NEW HIGHER DENSITY RACKS UNDER PRESENT CONDITIONS INCLUDING ALTERNATIVE SUGGESTIONS FOR HANDLING FUEL ALREADY IN STORAGE AND DISPOSAL OF THE EXISTING RACKS. 4. RECOMMENDATION OF TECHNIQUES, SPECIAL EXPERTISE AND/OR SPECIAL EQUIPMENT AND MATERIALS INVOLVED. 5. ESTIMATES OF INSTALLATION TIME, COST, AND STORAGE GAIN FOR SUCH NEW RACKS FOR EACH ALTERNATIVE RECOMMENDED. 6. ANY OTHER ASPECT THAT MAY ARISE FROM A CONSIDERATION OF THE ABOVE TASKS AND MAY NEED TO BE PURSUED TO ACHIEVE THE STUDY'S OBJECTIVES."

3. SECOND MAJOR ISSUE REMAINING CONCERNS G.E. DESIRE FOR ADDITION OF A NEW SENTENCE TO CLAUSE 9 OF THE AGREEMENT. IN RESPONSE TO GOI CONCERNS ABOUT SENTENCE, USG ASKED G.E. TO RECONSIDER ITS POSITION AND PROVIDE A FULL EXPLANATION OF ITS NEED FOR THE SENTENCE. AS REVISED BY G.E. TO EXPRESS ITS POINT MORE NARROWLY AND CONCISELY, THE SENTENCE IS AS FOLLOWS: "THIS INDEMNITY SHALL APPLY TO ALL CLAIMS,

INCLUDING THOSE BASED ON CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY, WARRANTY OR OTHERWISE, ASSERTED AGAINST ERDA, ITS CONTRACTORS OR SUBCONTRACTORS. GOVERNMENT OF INDIA ACKNOWLEDGES THAT ERDA'S CONTRACTORS AND SUBCONTRACTORS WILL NOT BE DENIED THE RIGHT TO PROCEED DIRECTLY AGAINST GOVERNMENT OF INDIA IN RESPECT OF THESE INDEMNITY RIGHTS."

4. G.E. EXPLANATION OF ITS NEED FOR ADDED SENTENCE SET
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FORTH ABOVE IS AS FOLLOWS: "WE VIEW THE ADDITION OF THESE SENTENCES AS BEING SIMPLY A CLARIFICATION OF WHAT HAS ALWAYS BEEN THE INTENT OF THE INDEMNITY IN THE FIRST SENTENCE OF CLAUSE 9, I.E., THAT IT APPLIES TO ALL CLAIMS, REGARDLESS OF THE LEGAL THEORY ON WHICH THEY MIGHT BE BASED, AND THAT IT IS ENFORCEABLE BY THE CONTRACTORS AND SUBCONTRACTORS OF ERDA AS WELL AS BY ERDA ITSELF. THE TECHNICAL LEGAL REASONS THAT REQUIRE THE ADDITION OF THE ABOVE SENTENCES IN ORDER TO ENSURE THAT THE PARTIES' INTENT ON THESE TWO POINTS WILL BE ENFORCED BY THE COURTS ARE EXPLAINED BRIEFLY BELOW. THE FIRST SENTENCE IS NECESSARY TO ENSURE THAT THE INDEMNITY WILL BE ENFORCEABLE REGARDLESS OF THE LEGAL THEORY ON WHICH A CLAIM TO WHICH IT APPLIES MIGHT BE BASED. THE ERDA-GOVERNMENT OF INDIA AGREEMENT PROVIDES THAT IT WILL BE CONSTRUED ACCORDING TO U.S. GOVERNMENT CONTRACT LAW. IT IS THE LAW IN SEVERAL U.S. JURISDICTIONS, AND WE BELIEVE GOVERNMENT CONTRACT LAW WOULD BE IN ACCORD, THAT AN INDEMNITY WILL NOT APPLY TO CLAIMS FOUNDED ON SPECIFIC LEGAL THEORIES, SUCH AS NEGLIGENCE AND STRICT LIABILITY, UNLESS THEY ARE EXPRESSLY REFERRED TO., E.G., PRICE VS. SHELL OIL COMPANY, 2 CAL. 3D 256, 85 CAL. RPTR. 178, 185-186 (1970) AND CASES THERE CITED; GOLDMAN VS. ECCO-PHOENIX ELECTRIC CORP., 62 CAL. 2D, 40, 41 CAL. RPTR. 73, 75-78 (1964) AND CASES THERE CITED: DART EQUIPMENT CORP. VS. MACK TRUCKS, INC., 9 CAL. APP. 3D 837, 88 CAL. RPTR. 670, 677-678 (1970). THE SECOND SENTENCE IS NECESSARY BECAUSE OF A POSSIBLE PROBLEM UNDER INDIAN LAW REGARDING THE ENFORCEABILITY OF THE INDEMNITY BY ERDA'S CONTRACTORS AND SUBCONTRACTORS. SUCH CONTRACTORS ARE NOT IN PRIVITY OF CONTRACT WITH THE GOVERNMENT OF INDIA, BUT RATHER IN THE POSITION OF THIRD PARTY BENEFICIARIES TO THE ERDA-GOVERNMENT OF INDIA AGREEMENT. OPINIONS OF OUTSIDE INDIA COUNSEL OBTAINED BY UNCLASSIFIED

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GENERAL ELECTRIC AT THE TIME IT ENTERED INTO THE ORIGINAL CONTRACT FOR THE TARAPUR STATION INDICATED THAT THERE IS SOME QUESTION UNDER INDIAN LAW AS TO WHETHER THIRD PARTY BENEFICIARIES CAN DIRECTLY ENFORCE CONTRACT PROVISIONS FOR

THEIR BENEFIT. HOWEVER, SUCH COUNSEL WAS OF THE OPINION
THAT THE GOVERNMENT OF INDIA WOULD PROBABLY BE PRECLUDED
FROM RAISING THIS AS A DEFENSE IF THE CONTRACT INCLUDED A
PROVISION SUCH AS THE SECOND SENTENCE WHICH WE HAVE PRO-
POSED BE ADDED. WHILE THE ERDA-GOVERNMENT OF INDIA AGREE-
MENT PROVIDES THAT U.S. GOVERNMENT CONTRACT LAW WILL APPLY,
IF SUIT WERE BROUGHT IN INDIA, AN INDIAN COURT MIGHT WELL
DETERMINE THAT THE QUESTION OF WHAT PARTY CAN ENFORCE THE
INDEMNITY IS A PROCEDURAL MATTER WHICH, UNDER TRADITIONAL
CONFLICT OF LAW PRINCIPLES, SHOULD THEREFO
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Message Attributes

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Disposition Case Number: n/a
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Drafter: U.S.ERDA/GC: J GLASGOW
Enclosure: n/a
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